

IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

UNITED STATES OF AMERICA, §  
§  
Plaintiff-Respondent, §  
§  
V. § CRIMINAL ACTION NO. H-04-0326-1  
§ CIVIL ACTION NO. H-11-2648  
MARIO ALONZO LUNA, §  
§  
Defendant-Movant. §

ORDER ADOPTING RECOMMENDATION OF THE MAGISTRATE JUDGE

Pending is the United States' Response and Motion to Dismiss (Document No. 458), and Movant Alonzo Luna's Motion for Leave to File "'Untimely Collateral Petition' Construed under the Governing Provisions of Title 28 U.S.C. § 2255 & 3582(c)(2) for Subsequent Substantial Assistance" (Document No. 451) and "'Timely' Petition under Title 18 U.S.C. § 3582(c)(2) to Constitutionally Preserve Legal Argument and Rights, in accord with the President's Fair Clarification Act" (Document No. 453). The Court has received from the Magistrate Judge a Memorandum and Recommendation recommending that the Government's Motion to Dismiss be GRANTED and that Luna's Motions be DENIED and DISMISSED WITH PREJUDICE. No Objections have been filed to the Memorandum and Recommendation. The Court, after having made a *de novo* determination of the Government's Motion to Dismiss, Luna's two motions for collateral review within the context of 28 U.S.C. § 2255, 18 U.S.C. § 3582, and FED. R. CRIM. P. 35(b), and the Magistrate Judge's Memorandum and Recommendation, is

of the opinion that the findings and recommendations of the Magistrate Judge are correct and should be and hereby are accepted by the Court in their entirety. Therefore,

It is ORDERED and ADJUDGED for the reasons set forth in the Memorandum and Recommendation of the United States Magistrate Judge signed and filed on May 9, 2012, which is adopted in its entirety as the opinion of the Court, that the Government's Motion to Dismiss (Document No. 458) is GRANTED and Movant Luna's Motion for Leave to File "'Untimely Collateral Petition' Construed under the Governing Provisions of Title 28 U.S.C. § 2255 & 3582(c)(2) for Subsequent Substantial Assistance" and "'Timely' Petition under Title 18 U.S.C. § 3582(c)(2) to Constitutionally Preserve Legal Argument and Rights, in accord with the President's Fair Clarification Act" (Document Nos. 451 and 453) are both DENIED and DISMISSED with prejudice. It is further

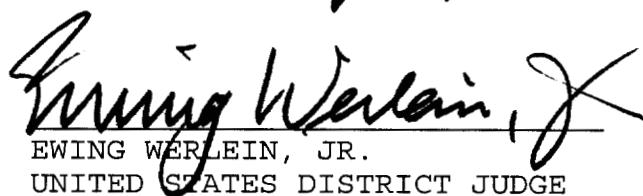
ORDERED that a certificate of appealability is DENIED. A certificate of appealability from a habeas corpus proceeding will not issue unless the petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This standard "includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Slack v. McDaniel, 120 S. Ct. 1595, 1603-1604 (2000) (internal quotations

and citations omitted). Stated differently, where the claims have been dismissed on the merits, the petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Id. at 1604; Beazley v. Johnson, 242 F.3d 248, 263 (5<sup>th</sup> Cir.), cert. denied, 122 S.Ct. 329 (2001). When the claims have been dismissed on procedural grounds, the petitioner must show that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Slack, 120 S. Ct. at 1604. A district court may deny a certificate of appealability *sua sponte*, without requiring further briefing or argument. Alexander v. Johnson, 211 F.3d 895, 898 (5<sup>th</sup> Cir. 2000).

For the reasons set forth in the Memorandum and Recommendation, which has been adopted as the opinion of the Court, the Court determines that Movant has not made a substantial showing of the denial of a constitutional right.

The Clerk will enter this Order and send copies to all parties of record.

Signed at Houston, Texas this 25<sup>th</sup> day of July, 2012.

  
EWING WERLEIN, JR.  
UNITED STATES DISTRICT JUDGE